

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

FILED
at _____ O'clock & _____ min _____ M
FEB 16 2011
United States Bankruptcy Court
Columbia, South Carolina (26)

IN RE:

C/A No. 10-04801-JW

Ashley Oaks Development Corporation,

Chapter 11

Debtor(s).

ORDER

This matter comes before the Court upon a Motion for Relief from Stay pursuant to 11 U.S.C. § 362(d)¹ ("Motion") filed by First Citizens Bank and Trust Company, Inc. ("First Citizens"). Ashley Oaks Development Corporation ("Debtor") objected to the Motion. The Court held a hearing on the Motion on February 3, 2011. Based upon the pleadings and the testimony and exhibits presented at the hearing, the Court makes the following findings of fact and conclusions of law.²

FINDINGS OF FACT

1. Debtor filed a Chapter 11 bankruptcy case on July 5, 2010.
2. Debtor is in the business of developing residential subdivisions and marketing the lots to residential builders. According to the schedules and statements filed July 23, 2010, Debtor owns several tracts of land in Richland County:

- (1) 42 lots and 113 acres
Ashley Oaks subdivision
- (2) 30.06 acres
Willow Lakes subdivision (currently undeveloped)
- (3) 229.24 acres and 2.33 acres
Abney Hills subdivision

¹ Further references to the Bankruptcy Code shall be by section number only.

² To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions of law constitute findings of fact, they are so adopted.

3. Prior to the hearing on the Motion, counsel for First Citizens and Debtor stipulated to the following: (1) First Citizen's debt amount as of November 17, 2010, including interest and fees, was \$279,763.03 with a per diem rate of \$35.17; (2) the Debtor's note to First Citizens had a maturity date of March 16, 2009; (3) the validity of First Citizens' lien and first mortgage on Willow Lakes subdivision, which consists of approximately 30 acres located on the eastern side of Farrow Road in Richland County, South Carolina ("the Property"); and (4) First Citizens' appraiser was qualified as an expert on valuation.

4. Darren Bouknight, an appraiser at Integra Realty Resources, testified for First Citizens. Mr. Bouknight prepared two appraisals for First Citizens. The first appraisal dated August 6, 2010 was subject to the "extraordinary assumption[]" and hypothetical condition[]" that "reasonable access for residential development is available" to the Property. Based on that assumption, the Property was valued at \$390,000.00.

5. Thereafter, First Citizens asked Mr. Bouknight to prepare another appraisal without the assumption of adequate access. In his second appraisal dated September 22, 2010, Mr. Bouknight assumed limited access from Farrow Road across a railroad to the Property, but did not assume development into a single family residential community. Based upon this limited access, Mr. Bouknight valued the Property at \$120,000.00.

6. In his second appraisal, Mr. Bouknight also considered alternative access through an adjacent subdivision. Based upon this alternative access, he valued the Property at \$200,000.00.

7. The Property is landlocked and the parties dispute whether there is access across a railroad track bordering the Property. An unrecorded railroad crossing agreement (“Railroad Agreement”) dated November 20, 1979, between Southern Railway Company (“Southern”), Lakewood Associates (“Lakewood”), the previous owner of the Property, William B. Thomasson (“Thomasson”), and Richland County, indicates that Southern granted Lakewood and Thomasson a license to construct and maintain a crossing of the railroad from Farrow Road to the Property. The agreement further provides that if the crossing is abandoned, all rights granted to the licensee shall cease and terminate.

8. Mr. Bouknight testified that his physical inspection of the Property indicates that the railroad crossing has been abandoned. Additionally, attached to his appraisal, is a letter from Norfolk Southern (“Norfolk”) to Debtor indicating that the crossing has been physically removed and unused for many years. The letter further indicates that the use of the crossing has been abandoned, and thus the Railroad Agreement was terminated. Norfolk also disputes that Debtor has the right to enforce the Railroad Agreement because it was not a party to the agreement.

9. Mr. Bouknight also testified that in his opinion the highest and best use of the Property would be to hold it and not develop it until the real estate market improves.

10. On cross-examination, Mr. Bouknight acknowledged a letter from Thomasson to Debtor, in which Thomasson takes the position that he never abandoned the right of access across the railroad, which he categorized as an easement, and that doing so would be foolish because the Property is landlocked. This letter was also included as an attachment to the appraisal. Mr. Bouknight also agreed that easements

generally run with the land; however, he testified that, in his opinion, the Railroad Agreement granted a license, not an easement.

11. Michael Shelley, principal of Debtor and guarantor of the debt to First Citizens, also testified at the hearing. Mr. Shelley testified that he was willing to personally commence adequate protection payments to First Citizens equal to the monthly interest on the debt.

12. Mr. Shelley also testified regarding the value of the Property and the issue of access. According to his testimony, he disputes Norfolk's determination that there is no longer access across the railroad. However, instead of litigating the validity of the previous railroad crossing, Mr. Shelley applied to Norfolk six to eight months ago for a new railroad crossing and signal. Norfolk responded that they would get back to him and, despite Mr. Shelley's follow-up, no new access has been granted or other agreement reached.

13. According to Mr. Shelley, Debtor is also pursuing access through lot 179 of an adjacent subdivision, Water Willow Way, which is currently being developed and has established roads that could provide access to Debtor's subdivision. Mr. Shelley testified that he offered \$50,000 in August of 2010 to purchase lot 179 in Water Willow Way subdivision. However, the owner of Lot 179 has not agreed to sell it.

14. Debtor proposes to develop the Property into a subdivision named Willow Lakes, which will have 85 lots to be sold at approximately \$30,000 per lot. After costs to develop the Property and pay off First Citizens, Debtor estimates a total profit of \$880,000.00. This proposal recognizes that it may take 12 to 14 months to get the railroad crossing approved. Mr. Shelley also testified that the County Council has

approved zoning for up to 85 lots but Debtor does not yet have a plat for such a development approved by Richland County.

15. Debtor's response to the Motion also indicates that Debtor is seeking additional financing from relatives of Mr. Shelley "to fund costs associated with the railroad easement and to pay a portion of the initial development costs."

16. According to Mr. Shelley's testimony, the Property is an ideal location for a residential subdivision because there are few residential lots available in that growing area. He also testified that Hurricane Builders has expressed interest in purchasing lots once the Property is developed, but Debtor does not currently have a contract with Hurricane Builders.

CONCLUSIONS OF LAW

First Citizens argues that it is entitled to relief from the automatic stay for cause pursuant to § 362(d)(1), based on a lack of adequate protection and Debtor's failure to make payments under the terms of the matured note and mortgage. First Citizens also alleges it is entitled to relief from the automatic stay pursuant to § 362(d)(2), alleging that there is no equity in the Property and the Property is not necessary for an effective reorganization. Debtor responds that its principal is willing to make adequate protection payments in the amount of the accruing interest. Debtor further asserts that there is equity in the Property to provide adequate protection and that the Property is necessary for an effective reorganization.

First Citizens has the burden of proof on the validity of its lien, the amount of its debt, and Debtor's lack of equity. 11 U.S.C. § 362(g)(1); In re Estate of Lake Blalock, LLC, C/A. No. 09-08987-JW (Bankr. D.S.C. Feb. 16, 2010). Debtor bears the burden on

all other issues, including lack of cause, the existence of adequate protection, and the necessity of the collateral for an effective reorganization that is within reasonable prospect. 11 U.S.C. § 362(g)(2); In re Henderson, 395 B.R. 893, 898-99, (D.S.C. 2008), Estate of Lake Blalock, at *4.

A creditor is entitled to relief from the automatic stay under § 362(d)(1) “for cause, including the lack of adequate protection of an interest in property of such party in interest.” 11 U.S.C. § 362(d)(1). Adequate protection includes a “creditor’s equity cushion or periodic payments sufficient to compensate the creditor for a diminution in value of the creditor’s collateral.” Estate of Lake Blalock, at *4-5.

Based upon the evidence presented, the Court finds First Citizens is not adequately protected by the value of the Property. The credible testimony of the appraiser presented by First Citizens indicates the value of the Property is less than the debt owed to First Citizens. Although the appraisal dated August 6, 2010 indicated that there is equity in the Property, that appraisal included the “extraordinary assumption” of adequate access. Therefore, the September 22, 2010 appraisal is a more accurate indication of the present value of the Property.

The parties disagree over the nature and extent of adequate access to the Property. First Citizens argues that the railroad company granted the previous owner a license to use the railroad crossing and that the license has been terminated due to abandonment. Debtor argues that the crossing has not been abandoned and that it presently has right to use the crossing. Despite whose position is correct, it is apparent from the letter attached to the appraisal that the railroad company disputes Debtor’s right to use the crossing.

However, according to Debtor's own proposal, it is not presently pursuing an enforcement of the previous Railroad Agreement.

Instead, Debtor is seeking a new agreement with Norfolk. Debtor submitted an application over six months ago for a new railroad easement to Norfolk. Even if Debtor's application was approved, Debtor acknowledged in its proposal that resolving the issue with Norfolk may take more than a year. Further, Debtor seemed confident at the hearing that the best way for it to gain access to the Property was by purchasing an adjacent lot in the neighboring Water Willow Way subdivision. However, at present, Debtor has no contract for such a purchase and the previous dealings with the owner of that lot indicate the owner's unwillingness to sell. The Court is not convinced that the methods Debtor proposes to gain adequate access to the Property are within reasonable prospect.

In determining the value of the Property, the Court recognizes that the uncertainty of the access negatively affects the value of the Property. Access to the Property as of the time of the hearing was contingent, at best, with no immediate prospect of being resolved and no indication of the cost that will have to be expended in order to resolve the issue. The Court agrees with evidence presented that without access, the value of the Property is less than the indebtedness to First Citizens. Therefore, the Court finds that there is no equity in the Property.

Although First Citizens is not adequately protected by equity in the Property, First Citizens may be adequately protected by monthly interest payments if made by Debtor.

So long as Mr. Shelley makes such payments each month, the Court would find that relief from stay should not be granted at this time pursuant to § 362(d)(1).³

Next, the Court analyzes whether First Citizens is entitled to relief from stay pursuant to § 362(d)(2), which provides that relief shall be granted if “the debtor does not have any equity in such property” and “such property is not necessary to an effective reorganization.”

As previously discussed, First Citizens has sufficiently demonstrated that Debtor lacks equity in the Property. Debtor is in the business of developing and selling lots in residential subdivisions. Debtor owns several parcels of real estate that are in different stages of development. While the Property at issue in this Motion is not the Debtor’s only asset, Debtor contends it is necessary for reorganization. However, “in order for property to be necessary for an effective reorganization, reorganization must be within reasonable prospect.” Henderson, 395 B.R. at 900 (citing United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 376, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)).

Debtor filed this case July 5, 2010 and has yet to file a plan of reorganization. It appears that Debtor needs additional financing to fund both the costs associated with acquiring access and other basic and necessary costs associated with developing the Property. No evidence was presented to the Court to indicate that there is a definite source for this additional financing.⁴ Presently, it is undisputed that the Property is landlocked and Debtor has not finalized the necessary agreements to develop the Property

³ Any order providing adequate protection payments would also provide that upon Debtor’s failure to timely make such payments, First Citizens would receive relief from stay without a further hearing upon the filing of an affidavit of default.

⁴ Debtor has not filed a motion to obtain credit or incur debt as of the date of this Order.

as proposed. Additionally, the evidence indicates that the market for single family residences is presently stagnant or at a slower than average rate. For the foregoing reasons, the Court finds Debtor has failed to meet its burden of proof that reorganization is within reasonable prospect. Therefore, the automatic stay should be lifted as to the Property pursuant to § 362(d)(2).

AND IT IS SO ORDERED.

Columbia, South Carolina
February 16, 2011


UNITED STATES BANKRUPTCY JUDGE